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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWIN W. EDWARDS, in his official capacity as Governor of Louisiana, WILLIAM W. GUSTE, JR., in his official capacity as Attorney General of Louisiana, LOUISIANA DEPARTMENT OF EDUCATION, and THOMAS G. CLAUSEN, in his official capacity as Superintendent of Education of Louisiana,

Appellants,

v.

DON AGUILLARD, LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ORLEANS PARISH SCHOOL BOARD, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF APPELLEES

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QUESTION ADDRESSED

Whether Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science Act" violates the Establishment Clause of the First Amendment because the Act's purposes and effect are to promote a religious doctrine and restrict secular instruction perceived as inconsistent with that religious doctrine and because the Act would excessively entangle public education with religion?

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CONSENT OF THE PARTIES

Appellants and appellees consented to the filing of briefs *amicus curiae* by all interested persons. The parties' letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Founded in 1916, the American Federation of Teachers, AFL-CIO ("AFT") is a labor organization of 630,000 members in more than 2,000 local affiliates. AFT's membership includes almost half a million elementary and secondary school teachers, college and university professors and others employed in public and private education. AFT members are of both sexes, all races and many ethnic groups, religious beliefs and creeds.

As bargaining representatives for public school teachers and staff, AFT local affiliates regularly negotiate and administer collective bargaining agreements with public school systems. As a union of educators, AFT is committed to improving the quality of education and enhancing the welfare and professional standing of teachers.

Throughout its history, AFT has sought fair treatment for teachers through the application of objective and employment-relevant criteria. AFT's historical commitment to the principle of equal opportunity has served as a philosophical foundation for its collective bargaining and legislative activity. Encompassed within this commitment is opposition to all forms of religious discrimination.

AFT recognizes that the diverse religious traditions of the American people enrich our nation's culture and provide the moral foundation of our democratic values. Indeed, AFT believes that the prominent role of religion in American and world history merits greater academic attention in the public school curriculum.

At the same time, AFT is committed to preserving the "wall of separation" between church and state prescribed by Thomas Jefferson and embodied in the First Amendment. In treating religion, public education must scrupulously maintain neutrality, neither advancing nor inhibiting religious doctrine. AFT believes that public

education must maintain its secular character, leaving instruction in religious doctrine to the church and the home.

These principles are the basis for AFT's argument for affirmance of the decision below.

STATEMENT OF THE CASE

At issue is the constitutionality of Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science Act." La. Rev. Stat. Ann. § 17.286, *et seq.* (West 1982).

The Act assumes there are only "two models" explaining "the origin of man, life, the earth, [and] the universe." § 286.4.A. The "two models" are (1) "creation-science" or "creation" or "creationism" and (2) "evolution-science" or "evolution." § 286 *passim.*

The Act defines "creation-science" as "the scientific evidences for creation and inferences from those scientific evidences," § 286.3(2), and "evolution-science" as "the scientific evidences for evolution and inferences from those scientific evidences." § 286.3(3).

Under the Act, whenever "classroom . . . lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe" in public schools, there must be "balanced treatment" of the "two models." § 286.4.A. The Act "does not require any instruction in the subject of origins but simply permits instruction in both scientific models (of evolution-science and creation-science) if public schools choose to teach either." § 286.5. "When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact." § 286.4.A.

The Act provides for "teacher inservice training funds" and "[e]xisting library acquisition funds" to be used

for training and the purchase of "nonreligious library books as are necessary to give balanced treatment to the creation-science model and the evolution-science model." § 286.6.

The Act requires each local school board to "develop and provide each public school classroom teacher in the system a curriculum guide on presentation of creation-science." § 286.7.A. The Act requires the governor to "designate seven creation-scientists" to provide "resource services in the development of curriculum guides" to local school boards "upon request." § 286.7.B.

The Act prohibits discrimination against "any student who demonstrates a satisfactory understanding of both evolution-science or [sic.] creation-science and who accepts or rejects either model in whole or part," § 286.4.B, and against any teacher "who chooses to be a creation-scientist or to teach scientific data which points to creationism[.]" § 286.4.C.

The Act, according to § 286.2, "is enacted for the purposes of protecting academic freedom."

The Fifth Circuit Court of Appeals held that the "the Act violates the establishment clause of the first amendment because the purpose of the statute is to promote a religious belief." *Aguillard v. Edwards*, 765 F.2d 1251, 1253 (5th Cir. 1985), *reh. en banc denied*, 778 F.2d 225 (5th Cir. 1985).

SUMMARY OF ARGUMENT

Louisiana's "Balanced Treatment For Creation-Science and Evolution-Science Act" violates the First Amendment because the Act's purposes and effect are to promote a religious doctrine and restrict secular instruction perceived as inconsistent with that religious doctrine and because the Act would excessively entangle public education—and public school teachers—with religion.

ARGUMENT

1.

Public education is the central common experience of tens of millions of Americans. The public school is where Americans of diverse ethnic, racial, religious, language and social groups learn to work and live together, and to respect one another. It is where Americans of varied backgrounds and values learn of their common political heritage: tolerance and pluralism, freedom and democracy.

Because of our diversity, pluralism and democratic tradition, we have placed the right to shape public education not nationally but locally. We have given the many state and local authorities broad discretion to reconcile the interests of the community, the state, the nation, parents, teachers and students and to prescribe the content of what is taught in their public schools.

It is also because of our diversity, pluralism and democratic tradition that we place limits on the discretion we give state and local authorities, among them the mandate that public education maintain neutrality in the area of religion: religious indoctrination, no matter how widely or deeply favored in the community, has no place in the public school.

The First Amendment to the United States Constitution, applied to the states by the Fourteenth Amendment, requires separation of church and state. The constitutional "wall of separation" must be rigorously maintained in the public school.

> Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable

> pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

McCollum v. Board of Education, 333 U.S. 203, 216-217 (1948) (Opinion of Frankfurter, J., joined by Jackson, Burton and Rutledge, JJ.)

Louisiana may exercise broad discretion to prescribe curricular standards for its public schools. It may not, however, breach the "wall of separation" between church and state.

2.

Louisiana's prescription for public school treatment of "the subject of the origin of man, life, the earth, or the universe" in classroom lectures, textbooks and library materials must be tested against the constitutional standard.

The First Amendment's Establishment Clause prohibits "laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education*, 330 U.S. 1, 15 (1946). To pass constitutional muster, a law "must have a secular legislative purpose," "its principal or primary effect must be one that neither advances nor inhibits religion," and it "must not foster 'an excessive government entanglement with religion' ". *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science Act" does not pass muster. Its purposes and effect are to aid and prefer one religious doctrine—creationism—and to restrict the teaching of scientific theory because it is offensive to that religious doctrine. The Act excessively entangles government in matters of religious doctrine. The Act is unconstitutional.

3.

Creationism is religious doctrine. Its central premise is adherence to the description of the creation of the world by God, the Creator, contained in the Judeo-Christian Bible's Book of Genesis.

Creationism's religious nature is evident from its social and legal history in the United States, a history of support for Biblical creationism and opposition to its perceived antithesis, evolution. *See Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (law criminalizing the teaching of evolution in public schools "because of its supposed conflict with the Biblical account, literally read" held unconstitutional); *Crowley v. Smithsonian Institution*, 636 F.2d 738 (D.C. Cir. 1980) (action to prohibit public museum's evolution exhibits dismissed); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975) (law requiring "commensurate attention to, and an equal amount of emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account in the Bible" held unconstitutional); *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark. 1982) (law requiring "balanced treatment to creation-science and to evolution-science" in public schools held unconstitutional); *Wright v. Houston Independent School District*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974) (action to prohibit the teaching of evolution in public schools dismissed).

That Louisiana's Act shares the Biblical purpose of these past efforts to support creationism and oppose evolution is demonstrated by the Act's language and structure, its legislative history, set out by appellees, and by the history of its sibling, the Arkansas "Balanced Treatment for Creation-Science and Evolution-Science Act."

The Arkansas statute was held unconstitutional because its purposes and effect are "the advancement of religion." *McLain*, 529 F. Supp. at 1272. Louisiana's Act is similar in language and structure and identical in purpose and effect. The two statutes have a common source and the same objectives: to promote Biblical creationism and to eliminate or nullify instruction in evolution because it is offensive to Biblical creationism.

The Arkansas statute began its definition of "creation-science" in language identical to Louisiana's definition: " 'Creation-science' means the scientific evidences for creation and inferences from those scientific evidences." *McLean*, 529 F. Supp. at 1264; La. Rev. Stat. Ann. § 286.3(2). The Arkansas definition, unlike Louisiana's, continued, enumerating the tenets of "creation-science," which include "sudden creation of the universe, energy and life from nothing" and "the occurrence of a world-wide flood." *McLean*, 529 F. Supp. at 1264. This "creation-science", the *McLean* court recognized, "has as its unmentioned reference the first 11 chapters of the Book of Genesis"; "[a]mong the many creation epics in human history, the account of sudden creation from nothing, or *creation ex nihilo*, and subsequent destruction of the world by flood is unique to Genesis". *Id.* at 1265.

Though Louisiana eschews enumeration of "creation-science" tenets, it duplicates Arkansas' principal definition and shares Arkansas' "fallacious pedagogy" and "contrived dualism", the premise that there are only two "models" explaining the world's origin—creationism and its antithesis, evolution. This premise is based upon religious doctrine and has "no scientific factual basis or legitimate educational purpose." *McLean*, 529 F. Supp. at 1266.

It is solely this religious "contrived dualism" that supports "balanced treatment." The premise of Louisiana's Act is the religious imperative that evolution must be offset by equal time for Biblical creationism. Other

than to foster religious doctrine—and to inhibit the teaching of scientific theory perceived as inconsistent with religious doctrine—the Act has no purpose.

4.

The religious purposes and effect of the Act are not avoided by the Act's coupling of variations of the term "creationism" with variations of the term "science".

In *McLean*, the court contrasted scientific theory with "creation-science":

> A scientific theory must be tentative and always subject to revision or abandonment in light of facts that are inconsistent with, or falsify, the theory. A theory that is by its own terms dogmatic, absolutist and never subject to revision is not a scientific theory. 529 F. Supp. at 1268-1269.

"Creation-science" assumes the literal truth of the Book of Genesis. The "creation-scientist" does not seek to test that religious assumption; it is beyond question. "Creation-science" is "simply not science." *Id.* at 1267-1269.

As noted by the court below, Louisiana's Act does not even purport "to promote creation science as a genuine academic interest." Rather, it requires "creation-science" instruction only in reaction to instruction in evolution—its purpose is to discredit scientific theory with religious doctrine. 765 F.2d at 1257.

Apart from religious doctrine, there is no "creation-science". It is not the subject of a body of scientific literature. It is not the focus of any group of scientists. There is no such academic or scientific discipline. There is no such secular curriculum. In short, "creation-science" has "no scientific merit or educational value as science[.]" *McLean*, 529 F. Supp. at 1272.

Indeed, the Act itself interchanges "creation-science" with the traditional terminology of religious doctrine,

"creation" and "creationism". The Act's intermittent use of the term "science" does not obscure the religious nature of creationism.

5.

Nor are the Act's religious purposes and effect avoided by the declaration that it was enacted to protect "academic freedom." § 286.2.

Academic freedom is the teacher's freedom to determine the form and content of instruction and teaching materials consistent with professional and curricular standards. Academic freedom, like the discretion of public school authorities, has limits, among them the constitutional requirement of separation of church and state: a public school teacher is no more free to teach religious doctrine than a public school board is free to adopt a religious curriculum. Teachers should, and do, have the freedom to teach scientific theory, whether or not it happens to coincide with a particular religious doctrine. Teachers should, and do, have the freedom to teach about religions. But, teachers do not have the freedom to disregard the First Amendment by teaching religious doctrine, even if couched in scientific terminology. The Act's statement of purpose is a *non sequitor*.

Moreover, contrary to the Act's purpose statement, the primary effect of the Act is to restrict academic freedom. The Act conditions and inhibits a teacher's freedom to teach a scientific theory, evolution. The Act dictates the content of the teacher's lectures. The Act limits a teacher's choice of textbooks and teaching materials. The Act requires teachers to infuse their instruction with religious doctrine. The Act would entangle teachers in the impossible task of interpreting religious doctrine and distinguishing between "nonreligious library books as are necessary to give balanced treatment to creation-science", § 286.6, and religious materials promoting "creation-science."

It is no service to academic freedom to force teachers into a choice between eliminating instruction in evolution —a recognized scientific theory—and adding instruction in "creation-science"—which "has no scientific merit or educational value as science" and which has as it objective "the advancement of religion." *McLean*, 529 F. Supp. at 1272.

In only one narrow respect might it be suggested that the Act seeks to protect teachers' freedom: one section prohibits discrimination against a teacher "who chooses to be a creation-scientist." § 286.4.C. To the extent this section is intended to prohibit religious discrimination against teachers, its purpose is proper. It would be wrong, indeed unconstitutional, for any public authority to take adverse action against a teacher because of the teacher's religious beliefs—so long as those religious beliefs do not interfere with the teacher's professional responsibility. A teacher cannot be subject to disability in public employment because he or she is Protestant, Catholic or Jewish—creationist or not—Islamic, Buddist or otherwise. But when a public school teacher infuses religious indoctrination into his or her teaching, the public employer must act to preserve constitutionally-mandated religious neutrality.

Even assuming a proper purpose of § 286.4.C, that section is nonetheless constitutionally deficient. It endorses religious indoctrination, immunizing one who chooses to teach particular subject matter for a religious purpose—because it "points to creationism." Furthermore, the Act singles out for protection adherents of only one religious doctrine, creationism. In doing so the Act favors those who subscribe to that one religious doctrine. It is a law which unconstitutionally "aid[s] one religion" and "prefer[s] one religion over another." *Everson*, 330 U.S. at 15.

The Act's purported purpose to preserve academic freedom is belied by its religious purposes and effect.

CONCLUSION

Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science Act" endorses Biblical creationism.

The Act has a religious premise, religious purposes and a religious effect. The premise of the Act is the premise of Biblical creationism: there are only "two models" explaining the origin of life, creationism and evolution. The purposes and effect of the Act are to promote Biblical creationism and to inhibit its perceived antithesis, evolution. And, the Act excessively entangles government with religion: it requires implementation of a non-existent distinction between religious doctrine and "creation-science"; it places the state's imprimatur on "creation-scientists"; and it nullifies the constitutional prohibition against religious instruction in the classroom.

By any constitutional measure—by the *Lemon* test or the refinement suggested by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 687-694 (1984) (O'Connor concurring)—the Act violates the First Amendment.

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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